INDEX

Motion to Dismiss or Affirm 1

Statement 1

Argument 4

Conclusion 9

CASES

Aero Mayflower Transit Co. v. Board of R.R. Comm'rs, 332 US 495 ..... 4, 5

Albertson v. Millard, 345 US 242 4

Bailey Farm Dairy Co. v. Anderson, 157 F2d 87, 329 US 788 8

Baldwin v. G.A.F. Seelig, 294 US 511 8

Black v. Cutter Laboratories, 351 US 292 6

Fry Roofing Co. v. Wood, 344 US 157 6

Grayson v. Harris, 267 US 352 7

Guaranty Trust Co. v. Blodgett, 287 US 509 5

Kingsley Int'l. Pictures Corp. v. Regents, 360 US 684 4

Polar Co. v. Andrews, 375 US 361 ..... 7, 8

Shuttlesworth v. City of Birmingham, 382 US 87 5

United States v. Burnison, 339 US 87 ..... 4, 5

Winters v. New York, 333 US 507 5

In the Supreme Court of the United States

No. 1004
OCTOBER TERM, 1966

ARDEN FARMS CO., a Delaware corporation, and DAMASCUS MILK COMPANY dba CARNATION COMPANY, an Oregon corporation,

Appellants,

v.

STATE DEPARTMENT OF AGRICULTURE, J. F. SHORT and KENNETH F. SAWYER,

Appellees.

On appeal from the Supreme Court of the State of Oregon

APPELLEES' MOTION TO DISMISS OR AFFIRM

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, respectfully move this Court to dismiss the above entitled appeal or, in the alternative to affirm the decision of the Supreme Court of the State of Oregon, on the grounds that said appeal does not present a substantial federal question, that the appeal is based upon non-reviewable grounds and that the decision of the Supreme Court of the State of Oregon rests upon an adequate, nonfederal basis.

STATEMENT

This is an appeal from a judgment of the Supreme

Court of the State of Oregon of November 23, 1966 and reported in 83 Or Adv Sh 543, 420 P2d 379. Appellants' petition for rehearing in said Court was denied on December 20, 1966. As stated in appellants' jurisdictional statement (page 7, footnote 9), the appellants attacked the administrative regulation on more than just a violation of the Commerce Clause, Article I, Section 8, namely that such regulation is without statutory authority; that such regulation is an unreasonable use of any delegated power; that such regulation denies the appellants and their out-of-state producers due process of law in violation of the XIV Amendment to the U. S. Constitution, and is in violation of Article I, Section 21, Article IV, Section 1 and Article I, Section 20 of the Constitution of Oregon.

The trial court opinion found the regulation a violation of the Commerce Clause and also that it was without statutory authority (Jur St, page 39). The Supreme Court of Oregon found such regulation did not violate the Commerce Clause and that the regulation was necessary, reasonable and proper under the statutory authority (Jur St, page 28).

These nonfederal issues were considered and determined by the state courts and were and are determinative of the cause here presented.

The Oregon milk stabilization program goals and the system of determining milk producers' prices are set out succinctly in the opinion of the Oregon Supreme Court (Jur St, pages 19-21). The questioned regulation requires milk handlers who use Oregon pool milk and also non-

pool milk[1] to report to the appellees their usage of milk on a total plant basis—the percentage of all milk used as Class 1 and that used as Class 2. This ratio of Class 1 and Class 2 is then applied to their usage of Oregon pool milk so that no arbitrary classification may be made by such handlers. The pool milk and nonpool milk receive the same percentage of the high and low priced classes as the handler *actually used* in his plant. The appellants are within this type of handler. It should be recognized and emphasized that handlers using nonpool milk totally are not subjected to this questioned regulation at all, as usage of Oregon milk is not affected nor is the Oregon pool producers' "blend" price.

It should further be clarified that out-of-state milk producers are not barred from participation in the Oregon stabilization program. Any non-resident producer desiring to supply the Oregon market may voluntarily join in the Oregon system and be allocated quota the same as if he were located in Oregon. The interpretation placed upon the questioned regulation by the appellants (Jur St, pages 8 and 12) that "the regulation, at all times and under all circumstances * * * neutralizes the natural economic advantage * * *" and that it "* * * will eliminate the largest Oregon milk importer from the

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[1] This may be of out-of-state origin or out-of-pool origin. The Oregon Market Area No. 1 does not include all counties in Oregon.

[2] At this writing, the Oregon pool consists of a total of 1114 producers sharing in the benefits of the Oregon stabilization program. Of this total, 237 are out-of-state producers who have joined voluntarily. About 70 out-of-state producers supply Oregon handlers without joining this Oregon pool plan.

interstate market.", is contra to existing facts as well as the opinion of the Oregon Supreme Court. High Class 1 plant usage would prove beneficial to handlers using nonpool, or out-of-state milk.

ARGUMENT

1. The construction of a state statute or regulation by a state court is not reviewable by this Court either by appeal or certiorari.

The Oregon Supreme Court rendered its decision upholding the validity of this questioned regulation after necessarily construing the same. Where the validity of such regulation has been sustained in the face of federal objections, this Court must accept the Oregon Supreme Court's analysis, or construction, of the same. That the appellants principally appeal on the basis of the construction placed upon the regulation by the Oregon Supreme Court is evidenced throughout their jurisdictional statement, and is openly admitted in their statement (Jur St, page 12) that "the patent inadequacy of the economic analysis which that [Oregon] court adopted" is a reason for this appeal.

As stated in *Kingsley International Pictures Corp. v. Regents*, 360 US 684 (1959) at 688:

> "We accept too, as we must, the construction of the New York Legislature's language which the Court of Appeals [of New York] has put upon it. *Albertson v. Millard*, 345 US 242; *United States v. Burnison*, 339 US 87; *Aero Mayflower Transit Co. v. Board of R.R. Comm'rs.*, 332 US 495."

As recent as 1965, the Court stated in *Shuttlesworth v. City of Birmingham*, 382 US 87 (1965) at 91:

> "The Alabama Court of Appeals has thus authoritatively ruled * * *. It is our duty, or course, to accept this state judicial construction of the ordinance. *Winters v. New York*, 333 US 507; *United States v. Burnison*, 339 US 87; *Aero Mayflower Transit Co. v. Board of R.R. Commrs'.*, 332 US 495."

The same application of principle was made in *Guaranty Trust Co. v. Blodgett*, 287 US 509 (1933) wherein the Court stated at 513:

> "Since the court below [Conn Sup Ct] construed the act of 1923, without regard to the act of 1929, as embracing the event sought to be taxed, and since in that view the question of contract impairment does not arise, we are bound by the decision of that court as though the meaning as fixed by the court had been expressed in the statute itself in specific words."

The appellants, themselves, argue that the "Commerce Clause" problem is only attainable by disputing the Oregon Court's construction as evidenced further by their statements concerning the "basic flaw in the Court's analysis * * *" (Jur St, page 8, footnote No. 13), the contents of their abundant footnotes to the effect that the Oregon Court "argued" to a certain result (Jur St, page 12, footnote No. 20), or "the Court below concluded that the regulation" will operate in a certain manner (Jur St, page 10, footnote No. 16).

It is submitted that under the uniform holdings of this Court, as exemplified in the above citations, the appellants' appeal should be dismissed. "This court * * *

reviews judgments, not statements in opinion." *Black v. Cutter Laboratories*, 351 US 292 (1955).

2. This Court will not exert its jurisdiction merely to review a state court decision upon a question of fact.

The tenor of appellants' complaints on appeal is that the Oregon Supreme court misconstrued, misunderstood and misapplied the questioned regulation. As mentioned in the first Argument, supra, this entails judicial construction by the state court of this regulation. In addition, it necessitates findings to questions of fact and conclusions of fact. The "devastating impact of the regulation" (Jur St, page 8) claimed by the appellants was not found to be a fact by the Oregon Supreme Court. To the contrary, the Oregon court found the regulation would encourage importation of milk (Jur St, page 22). Similarly, the finding that the appellants were not discriminated against by this regulation (Jur St, pages 23-24) is, again, a finding of fact by the Oregon Supreme Court.

This Court applied the above doctrine in *Fry Roofing Co. v. Wood*, 344 US 157 (1952) and stated at 160:

> "We are urged to set aside the findings of the State Supreme Court before passing upon the constitutional question presented. * * * Whether rejection of these findings would place petitioner's Commerce Clause contentions in a more favorable position, we need not consider. * * * There are no exceptional circumstances of any kind that would justify us in rejecting the Supreme Court's findings;"

The appellants are asking this Court to do as the petitioner requested in the cited case—set aside the Ore-

gon Supreme Court's findings and *as a result* discover a Commerce Clause issue and determine the same. That this is not within the accepted province of this Court appears clear. See also: *Grayson v. Harris*, 267 US 352 (1924) at 358, and the cases cited therein. It is again submitted that this appeal should be dismissed on this principle, also.

3. The present appeal presents no substantial federal question demanding this Court's plenary consideration.

The appellants strong, if not sole, reliance upon this Court's holding in *Polar Co. v. Andrews*, 375 US 361 (1964) in order to substantiate the view of a significant federal issue is misplaced.

The Oregon Supreme Court's opinion best expressed the clear distinction of that holding in stating (Jur St, page 26):

> "To come within the holding of the *Polar* case, Oregon's challenged regulation would have to require that handlers must purchase a minimum amount of Oregon-produced milk at Class 1 prices before the handlers could look to secondary sources of supply. This the Oregon regulation does not do. We are satisfied that any burden upon interstate commerce incidental to the preservation of the Oregon market pool is so negligible as to be barren of federal constitutional significance."

In the *Polar* case, the domestic milk supply was guaranteed full Class 1 usage by the administrative order. The Oregon regulation clearly demands nothing of the sort. It demands Oregon pool milk be given the same percentage of Class 1 usage as an Oregon handler actually uses in his plant. The questioned regulation, while fur-

thering the legislative purpose of milk market stabilization, in no sense creates an artificial protective device for local producers. *It does not exclude out-of-state milk.*

As stated in *Bailey Farm Dairy Co. v. Anderson*, (CCA 8) 157 F2d 87, cert den 329 US 788 (1946), and applicable to this Oregon regulation, it

> "* * * does not require payment of Class one price for any producers' milk that is not or cannot be used for Class one purpose * * *"

The "available" usage of an Oregon handler is the restriction in application of this regulation and clearly distinguishes the *Polar* case concept and consequently the *Baldwin v. G.A.F. Seelig*, 294 US 511 (1935) limitations to regulation of local commercial activities.

The arbitrary classification of usage by the appellants is a not too subtle device designed to avoid the Oregon legislative stabilization system, under the pretense of interstate commercial freedom. The appellants' criticism of the Oregon Supreme Court's judgment cannot be justified or sustained by such attempts to "stretch" the clear limitations of the *Polar* and *Baldwin* decisions.

CONCLUSION

For the foregoing reasons, the appellees respectfully submit this appeal should be dismissed and the judgment of the Supreme Court of Oregon affirmed.

Respectfully submitted,

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